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Ting Tiong Choon v Public Prosecutor

B HIGH COURT (MIRI) — CRIMINAL REVISION APPLICATION NO MYY-43–3/9 OF 2016
ALWI ABDUL WAHAB JC
2 DECEMBER 2016

C *Criminal Procedure — Search warrant — Application before magistrate — Magistrate granted respondent's application for search warrants — Whether search warrants granted by magistrate bad in law — Criminal Procedure Code s 56*

D The respondent had applied to the magistrate for search warrants based on two police reports made by one Hii King Chiong ('the complainant'). In the said reports, the complainant alleged that the applicant had made a false declaration that he was a qualified candidate for the State Constituency of Pujut N74 when
E he was not as he had acquired Australian citizenship. It was also mentioned in the police reports that the complainant had conducted a search from the Australian Election Commission's record ('ACE search') which revealed that the applicant was registered as an electorate in the Australia Federal Election. The ACE search was also attached to the police report. The magistrate had
F granted the respondent's applications for search warrants hence the applicant filed the present application for revision against the magistrate's order. The applicant submitted that the search warrants issued by the learned magistrate were bad in law due to non-compliance with the requirement of s 56 of the Criminal Procedure Code ('the CPC') whereas the respondent contended that
G the search warrants were legally issued in accordance with the law.

Held, allowing the application and setting aside the order:

(1) The facts and records presented before the learned magistrate were
H incomplete. Without the supporting document in the form of 'ACE search', what was alleged by the complainant in the police report, at best, a mere allegation which did not constitute credible information to form a basis for believing that the applicant was a registered voter in the Australia Federal Election. The burden was on the respondent to produce
I the 'ACE search'. The learned magistrate had failed into error when she issued the order without making an inquiry on the 'ACE search' document which was crucial to the allegation of dual citizenship as alleged by the complainant. Thus, the issuance of the search warrants was not in accordance with the law (see paras 12–15).

[Bahasa Malaysia summary

Responden telah memohon kepada majistret untuk waran carian berdasarkan atas dua laporan polis yang dibuat oleh seorang bernama Hii King Chiong ('pengadu'). Dalam laporan tersebut, pengadu mendakwa yang pemohon telah membuat deklarasi palsu bahawa dia adalah calon yang layak untuk kawasan Dewan Undangan Negeri Pujut N74 sebenarnya dia tidak kerana dia telah mendapat kerakyatan Australia. Ia juga disebut di dalam laporan polis bahawa pengadu telah menjalankan carian daripada rekod Suruhanjaya Pilihan Raya Australia ('carian SPRA') yang menunjukkan bahawa pemohon didaftarkan sebagai pengundi di dalam Pilihan Raya Persekutuan Australia. Carian SPRA tersebut juga melampirkan laporan polis. Majistret telah membenarkan permohonan-permohonan responden bagi waran carian maka pemohon memfailkan permohonan ini bagi semakan terhadap perintah majistret. Pemohon berhujah bahawa waran carian oleh majistret yang bijaksana adalah tidak baik dari segi undang-undang akibat daripada ketidakpatuhan dengan kehendak s 56 Kanun Tatacara Jenayah ('KTJ') sebaliknya responden berhujah bahawa waran carian adalah dikeluarkan secara sah mengikut undang-undang.

Diputuskan, membenarkan permohonan dan mengenepikan perintah:

(1) Fakta dan laporan yang dikemukakan di hadapan majistert yang bijaksana adalah tidak lengkap. Tanpa dokumen yang menyokong dalam bentuk 'ACE search', apa yang didakwa oleh pengadu dalam laporan polis, hanyalah dakwaan yang tidak membentuk maklumat yang boleh dipercayai untuk membentuk asas bagi mempercayai pengadu adalah pengundi berdaftar di dalam Pilihan Raya Persekutuan Australia. Beban adalah ke atas responden untuk mengemukakan 'ACE search'. Majistret yang bijaksana telah gagal atas kesilapan apabila beliau mengeluarkan perintah tanpa membuat siasatan ke atas dokumen 'ACE search' yang mana adalah penting kepada dakwaan dua kerakyatan seperti yang didakwa oleh pengadu. Oleh itu, pengeluaran waran carian tidak mengikut undang-undang (lihat perenggan 12–15).]

Notes

For a case on application before magistrate, see 5(2) *Mallal's Digest* (5th Ed, 2015) para 3843.

Cases referred to

Chong Chieng Jen v Mohd Irwan bin Md Radzi & Anor [2009] 8 MLJ 364, HC (refd)

Legislation referred to

Criminal Procedure Code s 56
Penal Code s 199

Alan Ling Sie Kiong (Suhaili & Ling Advocates) for the applicant.
Noor Fadzila Ishak (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Alwi Abdul Wahab JC:

INTRODUCTION

[1] The applicant, the State Assemblyman for the constituency of Pujut N74 filed the present application for revision vide a letter dated 20 September 2016 signed by his counsel Mr Alan Ling Sie Kiong and supported by his own affidavit which was affirmed on the same date.

BACKGROUND FACTS

[2] The facts giving rise to this application for revision are this. On the 13 September 2016, the learned magistrate has granted three applications (different case number was given to each application) by the respondent, ASP Soliment Nyian for search warrants to be issued under s 56 of the Criminal Procedure Code. The purpose of the search warrants is to look for any evidence in respect of which an offence under s 199 of the Penal Code has been committed at various places mentioned in the applications, namely, [1] the applicant's resident at No 29, Jalan Bunga Kertas, Lai Pau Garden, Miri; [2] the DAP Headquarters, Lot 1917A and 1917B, 2nd Floor, Jalan Datuk Edward Jeli, Miri; and [3] the applicant's clinic, Ground Floor, Lot 955, Jalan Kwantung Miri.

[3] The application by the respondent was based on two police reports made by one Hii King Chiong ('the complainant') on the 11 June 2016 and 15 June 2016 which were attached to each of the applications. Together with the written applications and the police report there was an attachment titled 'Maklumat Bertulis' signed by ASP Soliment. In actual fact the contents of the two police reports lodged by the complainant are similar pertaining to false declaration and cheating allegedly committed by the applicant. In the said police reports, the complainant alleged that the applicant had made a false declaration that he was a qualified candidate for the State Constituency of Pujut N74 when he was not as he had acquired Australian citizenship. By giving the said false declaration, indirectly, it gives the meaning that the applicant had cheated all the voters and the Election Commission to believe that he was entitled to be nominated as candidate in the state election for the seat of Pujut N74.

THE REVISION

[4] Pursuant to the application for revision, it was the contention of learned counsel for the applicant that the search warrants issued by the learned magistrate on 13 September 2016 were bad in law due to non-compliance with the requirement of s 56 of the Criminal Procedure Code. Through this application, learned counsel for the applicant invited this court to carefully examine the records of proceedings of the magistrate's court for the purpose of satisfying this court as to the correctness, legality or propriety of the order given by the learned magistrate in issuing the search warrants.

[5] It was also the contention of learned counsel for the applicant that the learned magistrate has failed to conduct the necessary inquiry before granting the respondent's application for search warrants. According to Mr Alan, there are basically three steps which need to be carried out by the learned magistrate pursuant to s 56 of the Criminal Procedure Code before any search warrant may be issued. Firstly, there must be some information laid before the magistrate.

[6] Secondly, the magistrate must make inquiry based on the information laid before her and thirdly, upon such inquiry she must have reason to believe that anything in respect of which an offence has been committed or any evidence or thing which is necessary to the conduct of an investigation into any offence may be found in any place. The learned magistrate in the present case, had not exercised her judicial function in the manner prescribed by the law as the above steps are not carried out before she issued the search warrants, said Mr Alan.

INFORMATION

[7] Mr Alan submitted that the alleged 'any document' which the respondent intended to retrieve from the applicant's premises is vague, ambiguous and indefinite without any basis. The learned magistrate did not require the respondent to produce the 'ACE search' to show that the applicant is a registered voter in Australia which was supposed to be the basis of the complaint and ought to be exhibited but conspicuously absent from the records. In the absence of the supporting document, there is no credible and sufficient information which laid to the magistrate's reason to believe that the alleged offence had been committed.

[8] Mr Alan referred to the case of *Chong Chieng Jen v Mohd Irwan bin Md Radzi & Anor* [2009] 8 MLJ 364 to support his contention that the information alone is not enough but one credible enough to form a basis for believing that certain offence has been committed. The learned magistrate

should have requested the respondent to produce further document as it is deemed to be existed in the possession of the respondent and to satisfy herself that such offence is committed before such order is made.

THE LEARNED DPP'S SUBMISSION

[9] The learned DPP's argument was that the holding of an inquiry is not mandatory. The inquiry in any event will only be held if the learned magistrate thinks it is necessary to do so. According to Puan Noor Fadzila, the learned DPP, there is sufficient information being laid in the written application by the respondent that a police report was lodged by the complainant stating that the applicant was registered as a voter in Australia. In his police report, the complainant stated that upon making a search in the Australian Election Commission's record, he found that the applicant is enrolled as a voter in Australia. Attached to the police report is a copy of 'ACE search' showing the applicant's name recorded as a voter. Hence, according to the learned DPP there is sufficient credible information laid before the learned magistrate which constitute reasons to believe that such offence is committed and it is necessary to search the applicant's premises to look for any evidence relating to the offence.

[10] The learned DPP submitted that the learned magistrate, in the notes of proceedings stated that she had read and perused the application and the relevant documents before she allowed the application. It shows that the learned magistrate had exercised her mind judiciously after her perusal of the application and the relevant materials before her. The learned DPP also submitted that there is no requirement for the learned magistrate to give her reasons for allowing the application under s 56 of the Criminal Procedure Code. In short, the DPP submitted that the search warrant was legally issued in accordance with the law.

THE COURT'S FINDINGS

[11] This revision came after the issuance of the search warrants on 13 September 2016 as ordered by the learned magistrate and they were carried out immediately by the police officer on the next day. There were no incriminating exhibits found by the police at those places mentioned in the search warrants. Although this application has now become academic, the applicant was able to convince me that there is meritorious issue raised in the application which called for my consideration relating to the correctness, legality or propriety of the order given by the learned magistrate in issuing such warrants. This revision may serve to prevent abuse of the court process and to avoid future recurrence as pointed out by learned counsel for the applicant. It was also the concern of the applicant that a search warrant should not be issued arbitrarily by the court save as in accordance with the law in particular s 56 of

the Criminal Procedure Code.

[12] Upon my examination of the notes of proceedings of the magistrates' court, it appears that the magistrate was informed concerning the police reports lodged by the complainant which formed the basis for the respondent's application for the search warrants. It was also mentioned by the complainant in the police report that he had conducted a search from the Australian Election Commission's record which revealed that the applicant was registered as an electorate in the Australia Federal Election. The so-called 'ACE search' showing the applicant's name as a registered voter was attached to the police report as stated therein. This document is apparently absent from the records despite its importance to satisfy the learned magistrate that she had reason to believe that such offence in relation to such document had been committed. In my view, it is incumbent for the learned magistrate to move on to the next step to find out from the respondent on the existence of such 'ACE search' document so that sufficient materials are properly placed before her and to enable her to make an informed decision on whether to issue the warrant or not. As it appears, the facts and records presented before the learned magistrate are incomplete.

[13] Without the supporting document in the form of 'ACE search', what was alleged by the complainant in the police report, at best, a mere allegation which does not constitute credible information to form a basis for believing that the applicant is a registered voter in the Australia Federal Election. The learned magistrate must exercise due care and diligence in dealing with the application of this nature as the impact of its execution is so great that it may result in the invasion of one's privacy and rights to property. Had the learned magistrate exercises due care and diligence, it is highly probable that she might not have issued the search warrant without asking for further information or making further inquiry from the respondent respecting the 'ACE search' document (*Chong Chieng Jen v Mohd Irwan bin Md Radzi & Anor*).

[14] In the present matter, we have two situations. On the one hand, the applicant who won the seat for the State Constituency of Pujut N74 obviously had already fulfilled the requirement of being the nominee to contest as candidate and on the other hand, there was an allegation by the applicant's election opponent to say that the applicant was not a qualified candidate due to his dual citizenship. The burden is therefore on the respondent to produce the said 'ACE search' document to support the allegation made by the complainant and for the learned magistrate to assess the validity of the complaint based on sufficient materials placed before her.

CONCLUSION

[15] For the above reasons, I find that the learned magistrate had failed into error when she issued the order without making an inquiry on the 'ACE search' document which is crucial to the allegation of dual citizenship as alleged by the complainant. The issuance of the search warrants, therefore, in my view, were not in accordance with the law. In other words, there were unlawfully issued. In the premises, I allow the application and set aside the order.

Application allowed; order set aside.

Reported by Dzulqarnain Ab Fatar